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BRIEF OF APPELLEE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY
Appellant

vs.

J. A. ANDERSON, State Highway Commissioner
of Virginia
Appellee

APPEAL FROM THE SUPREME COURT OF
APPEALS OF VIRGINIA

ABRAM P. STAPLES,
Attorney General of Virginia,
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BRIEF OF APPELLEE

STATEMENT

On October 13, 1941, the Appellee, Virginia State Highway Commissioner, pursuant to the provisions of

subsection 4 of section 1969-j of Michie's Virginia Code, after notice to Appellant, deposited in the Circuit Court of Fairfax County the sum of $1,500.00 which he estimated to be the fair value of certain lands of Appellant proposed to be taken in the exercise of the power of eminent domain vested in the Appellee by subsection 1 of said section, said sum deposited including also Appellee's estimate of damage to lands not taken. Two days later Appellee entered upon a part of said land for the purpose of proceeding with the construction of the proposed highway. One week later Appellant instituted a suit in equity in said court to enjoin the taking of his land for highway purposes, raising various constitutional questions. The Supreme Court of Appeals of Virginia affirmed a judgment of said Circuit Court sustaining Appellee's demurrer to the Bill. The questions raised and decided therein are set out in the opinion of the Court, *Bailey* v. *Anderson*, 182 Va. 70. This Court denied Appellant's petition for a writ of certiorari to this judgment. 321 U. S. 799.

This appeal arises out of the condemnation proceedings which were instituted June 17, 1943, by Appellee in the said Circuit Court for the appointment of commissioners to ascertain the just compensation for Appellant's lands involved and to award damages, if any, resulting to his adjacent lands (R. p. 1). On April 22, 1944, Appellant filed his "plea setting up claim for damages" (R. pp. 5-8), and Appellee on May 12, 1944, filed his motion to strike same (R. p. 8). The court sustained the motion as to paragraph 4 of the plea

and overruled same as to all other parts and ordered that the said plea of Appellant be considered as his grounds of defense. Whereupon the court appointed commissioners to ascertain and award compensation and damages to Appellant. The commissioners found that the sum of $1,500.00 (the amount previously deposited in court by Appellee), for the 3-98/100 acres taken was just compensation for said land taken and that the damages to the adjacent and other lands of Appellant amounted to $6,500.00. The commissioners' report was filed on July 12, 1944 (R. p. 28). On July 18, 1944, Appellant filed his exception to said report upon the sole ground that the compensation and damages awarded were "grossly disproportionate to the claims made by the Defendant (Appellant)." (R. p. 29). On July 20, 1944, the Appellee, Highway Commissioner, also filed exceptions to said report upon various grounds, i. e., that the award was grossly excessive and contrary to the preponderance of the evidence; that improper evidence was permitted to be introduced before the commissioners on behalf of Appellant, and proper evidence offered by Appellee was excluded (R. pp. 30-33).

On August 11, 1944, the court confirmed the report over the objections of both Appellant and Appellee, to which they both excepted. The order of confirmation shows that Appellant stated to the court that no claim was being made for interest on the $1,500.00 awarded as compensation for the land taken. The order also denied Appellant's claim for interest from October 15, 1941, to the date of the award on the

$6,500.00 damages awarded him, to which denial Appellant excepted (R. pp. 33-37). On August 22 the Appellee deposited in court the amount of the award with interest from the date of the order, August 11, 1944 (R. p. 37).

To secure a review of this order of the Circuit Court the Appellant applied to the Supreme Court of Appeals of Virginia for a writ of error, his petition containing three assignments of error, which are also here relied upon: First, that the denial to him of interest on the amount awarded as damages from the time of Appellee's entry on the land violated the due process clause of the Fourteenth Amendment; Second, that the Virginia statute under which such entry was made denied him due process, and, Third, that consequently he was entitled under the requirements of due process to compensation by way of rental for the use of his property until the condemnation proceedings were completed (R. p. 39). On November 22, 1944, the Supreme Court of Appeals, "being of opinion that said judgment (of the Circuit Court) is plainly right", entered an order refusing the writ of error and affirming said judgment (R. p. 41).

This appeal is from the aforesaid order of the Supreme Court of Appeals.

SUMMARY OF ARGUMENT

This appeal should be dismissed for want of a properly presented substantial Federal question.

1. The Virginia statute challenged has afforded a fair and impartial hearing to the Appellant in judicial

proceedings to determine the just compensation to which he is entitled for land taken by the State for highway purposes and the damages to other lands owned by him. He actively participated in said hearing and has not been arbitrarily deprived of any legal right. The requirements of due process have been fully met.

2. First and second Assignments of Error—Due process does not require that the commissioners who are to ascertain what is just compensation for land taken and the damages to other lands shall view the premises before the construction thereon of proposed public works. Such preview is not necessary in order to render lawful a taking of such land by the State in the exercise of its power of eminent domain, where reasonable provision is made to assure the payment of just compensation and damages. Appellant's land, having been taken under such circumstances, the State's possession was not tortious or unlawful, and the landowner is not entitled to be paid rental for the land taken pending the ascertainment of just compensation therefor.

3. Third Assessment of Error—Appellant is not entitled to interest upon the amount of the commissioners' award for damages to other lands owned by him between the time Appellee entered upon the land taken and the time of the award. In condemnation proceedings in Virginia the award itself includes all interest and damages to which the landowner is entitled up to the time of its rendition. The order of the Circuit Court provided for future interest on the amount of the award until same was paid.

The Appellant did not request that any specific instruction be given to the commissioners by the court on the subject of including such interest in or excluding same from their award, and he must be held to have acquiesced in the submission to them of the question of past interest in accordance with the general practice.

The record of the proceedings in the Circuit Court, therefore, does not properly present the question raised by him that he has been denied interest on damages to his other lands from the time of Appellee's entry into possession of the land taken until the time of the award. The law of Virginia presumes that such interest is included in the award.

The due process clauses of neither the Fifth nor the Fourteenth Amendment require compensation to be paid for damages caused by the taking of land in the exercise of the power of eminent domain, but only that the landowner be compensated for the value of the land actually taken.

It is true that section 58 of the Constitution of Virginia prohibits the enactment of "any law whereby private property shall be taken *or damaged* for public uses without just compensation." But whether the mandates of this section are met by judicial proceedings provided by State laws to be conducted in State courts is not a Federal question, but one for the determination of the Virginia courts alone. Therefore, whether such proceedings have resulted in the payment to Appellant of proper interest on consequential damages sustained by him is not a Federal question at all. The judgment of the Virginia Supreme Court of Appeals on this question will be accepted as conclusive in this Court.

ARGUMENT

This appeal should be dismissed for want of a properly presented, substantial Federal question.

I.

General Statement of Requirements of Due Process

The statutes of Virginia, as construed by her highest Court, provide fair and adequate machinery for ascertaining the compensation and amount of damages to which a landowner is entitled by reason of the taking of his property by the State under its power of eminent domain. However, even if the Court should be of opinion that some other method of determination of values and damages is more desirable, this would not justify a finding that due process is lacking. To so find, it must appear that there has been a gross disregard of the right of the owner to be compensated for the taking of his property. The due process clause does not insure immunity from judicial error.[1]

The value of Appellant's property taken and damages to the residue have been ascertained by impartial commissioners under the supervision of the Circuit Court.

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[1] *Honeyman* v. *Hanan*, 302 U. S. 375, 378; *Seattle R. & S. R. Co.* v. *Washington*, 231 U. S. 568, 570; *Gasket* v. *Lapeyre*, 242 U. S. 367, 369; *McCoy* v. *Union Elev. Ry. Co.*, 247 U. S. 354, 363; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332; *Roberts* v. *New York*, 295 U. S. 264; *Backus* v. *Fort St. Depot*, 169 U. S. 557; *Appleby* v. *Buffalo*, 221 U. S. 524, 532; *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393-4.

Appellant makes no charge of any misconduct. The amount awarded greatly exceeded what the Appellee's counsel in the Circuit Court thought fair, as appears from the exceptions filed by him (R. pp. 30-33). The Supreme Court of Appeals has pronounced the judgment plainly right.

With this background the Assignment of Error will be considered.

II.

First and Second Assignments of Error

Appellant complains of denial of due process because the statute does not insure a view of the property of a landowner by the commissioners until after the completion of the construction of the highway. He argues that the viewers cannot then visualize the original condition of the ground from blue prints or the surrounding contours. He ignores the fact, however, that they would have the same or perhaps greater difficulty in visualizing beforehand the changed condition which will result from the improvements contemplated. There is no such material difference in their ability to properly evaluate the compensation and damages in these respective situations as to operate to the prejudice of the landowner. Certainly there is no such arbitrary impairment or destruction of his rights in the prescribed procedure as can be held to be a denial of due process. Section 258-a of the United States Code goes even further than the Virginia statute in that it immediately vests title to the land to be taken

upon the deposit of the amount of the estimated compensation, although an indefinite period may elapse before the determination of the actual amount thereof, and the contemplated improvements may then have been completed. The constitutionality of said section 258-a has not been challenged in this Court, but it has been sustained by numerous decisions in the lower Federal courts. See notes to section 258-a in United States Code Annotated.

Many years ago, in 1897, this Court said, "there can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof." *A. Backus & Sons* v. *Fort Street Depot Co.*, 169 U. S. 557, 558-9.

In the case of *Bragg* v. *Weaver*, 251 U. S. 57, a Virginia statute was challenged as violative of due process. The statute was substantially the same as subsection 3 of section 1969-j of Michie's Virginia Code. It empowered the public road authorities, without notice to the landowner and without the institution of any legal proceedings, to enter upon the most convenient lands and take therefrom earth to be used in the construction and repairing of the highways. If the landowner or tenant considered himself injured by such taking, provision was made, upon his complaint, for viewers to ascertain what was a just compensation for the damage sustained, with right of appeal to the Circuit Court. In sustaining the validity of the statute this Court held that the necessity and expediency

of the taking are not judicial but legislative questions and may be determined by such agency as the State may designate, and that since the statute afforded the owner ample opportunity to appeal and thereby to obtain a full hearing in the Circuit Court on the question of damages, it thus satisfied the requirements of due process. The following quotation from the opinion is pertinent to Appellant's contention that the viewers must see the land before excavations or charges in its condition are made. After stating that the hearing on appeal was sufficient the opinion continued:

> "The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law in the sense of the 14th Amendment merely because it precedes the ascertainment of what compensation is just. *Sweet* v. *Rechel*, 159 U. S. 380, 402, 407, 40 L. Ed. 188, 197, 198, 16 Sup. Ct. Rep. 43; *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445; *Williams* v. *Parker*, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440; *Crozier* v. *Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 306, 56 L. ed. 771, 776, 32 Sup. Ct. Rep. 488. * * *" (251 U. S. p. 62).

But, even if there were any merit in the above contentions of Appellant, the question whether section

1969-j of the Virginia Code, under which these proceedings were instituted, is in violation of the due process clause has been adjudicated adversely to Appellant by the Supreme Court of Appeals in the equity case above referred to. *Bailey* v. *Anderson* (182 Va. 70). This is the law of the case and *res judicata*, certainly in this proceeding. Appellant seeks to escape from this conclusion on the ground that he did not argue the same objection to the statute's validity in that tribunal that he now advances here. However, he knew the highway was being constructed and that original conditions would be changed and he could have made the same argument if he had desired. Obviously he cannot re-open the same constitutional question, i.e.—whether the statute denies due process, merely by advancing a new argument or different ground of objection. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 290, 291; 34 C. J. p. 818, Sec. 1236; 30 Am. Jur. p. 932, Sec. 187.

Appellant's claim in his second assignment of error that he is entitled to be paid rental at the rate of $200.00 per month for the use of the land taken for highway purposes is predicated upon the assumption that the Virginia statute authorizing the Highway Commissioner to enter upon and take possession of the land prior to the institution of condemnation proceedings is unconstitutional. He contends that Appellee's possession under such statute is, therefore, wrongful and unlawful and that due process entitles him to be compensated *by way of rental* for such unlawful use from the time of Appellee's entry until the vesting of

title in him. Since the premise of unconstitutionality, upon which his claim is based, is clearly without merit, it is not deemed necessary to discuss the other incidental questions argued by him. He has already received compensation for such use in the form of interest which is included in the award of the commissioners.

III.

Third Assignment of Error

The Appellant contends under this assignment that due process guarantees to him a finding by the commissioners of the amount of damages to property owned by him *other than that taken*, and also a judgment by the Court for interest on said amount from the time of Appellee's entry on the property *taken*. There is no dispute as to the right generally of a landowner to have proper interest allowed. The question here involved is one of procedure. In Virginia the practice is for the commissioners to include in their award the amount of all damages sustained up to the time of the making of their award, or in some cases up to three months thereafter. In other words, the interest is regarded as one of the elements of damage, and the court evidently considered it as included in the amount fixed as damages in the report of the commissioners.

While there is no decision of Virginia's highest Court involving interest in a case where the land was taken prior to the institution of condemnation proceedings, the general procedure with respect to interest on compensa-

tion and damages in such proceedings is stated in *City of Richmond* v. *Goodwyn,* 132 Va. 442, 452-454. There the compensation and damages were fixed by the commissioners before the condemnor, the City, had elected whether it would take the property at the amount fixed. The Supreme Court of Appeals, in reversing a judgment allowing certain interest on the sum fixed by the commissioners, said: "The commissioners, in fixing such compensation, are presumed to have allowed for the inconveniences, damage and delay arising out of the proceedings, certainly to the date of the filing of their report * * *." This statement was later quoted with approval in the case of *Export Leaf Tobacco Co.* v. *City of Richmond,* 163 Va. 145, 155. This later case did not arise out of condemnation proceedings, but involved the question when interest should run on a statutory award made in judicial proceedings to compensate a landowner for damages caused by a change in the grade of a street. In approving the general rule of procedure laid down in the *Goodwyn case, supra,* the Court held that interest should run from the date of the award.

A case involving the precise question under discussion arose in West Virginia in 1938; *State* v. *Painter,* 120 W. Va. 486, 199 S. E. 372. The State constitutional provisions there considered are identical with those of Virginia and the statutory proceedings quite similar, the main difference being that in West Virginia exceptions to the findings of the commissioners are tried before a jury, which is empowered to make new and independent findings. Nearly two years elapsed after

entry was made and after the commissioners' findings before the jury trial was had. The landowner claimed he was entitled to interest on the jury's award from the time of condemnor's entry on the land. The Circuit Court, however, allowed interest only from the date of the verdict. In affirming this judgment the Supreme Court of Appeals of West Virginia recognized the condemnee's right to receive interest for said time, but held further that, unless the record shows affirmatively that the jury did not take into consideration the matter of said interest, it will be presumed that it did consider it as an element of damage and that it included same in its verdict. The opinion points out the trial court "could have directed the jury to include interest from the date of taking, or reserved that matter to itself in the entry of the judgment on the verdict. Not having entertained either course, the Court had no justification for the addition of interest to the amount of the verdict." (199 S. E. 374.)

Cases in other States have applied the rule that in condemnation proceedings, in the absence of an instruction reserving the question of interest for consideration by the Court, it will be presumed that the award includes interest from the date of possession to the date of the award, among them the following: *Minot* v. *Boston*, 201 Mass. 10, 25 L. R. A. (N. S.) 311 and note; *Blackwell* v. *Bebout*, 19 Okla. 63, 14 Ann. Cas. 1145. See also 18 Am. Jur. 917, Sec. 277.

In the *Minot Case*, *supra*, the Massachusetts court emphasized the fact that "the amount of damages to be awarded, interest and all, was by the law in the hands

of the jury" and, therefore, the trial court was without power to add interest to their verdict for a period of over six years representing the time between the taking of the land and the date of the jury's verdict fixing compensation and damages.

From the foregoing authorities it is clear that the Circuit Court below had no authority to add interest to the award of the commisisoners. Although it is the practice in Virginia for the court, *sua sponte* or upon request, to instruct the commissioners upon matters relating to the fixing of compensation and damages in condemnation proceedings. (*Talbot* v. *Norfolk,* 158 Va. 387), no instructions on the question of interest were requested by the Appellant or given to them by the Circuit Court. Even the few excerpts from the testimony appearing in the record show that the commissioners were informed that construction of the highway began October 15, 1941, and that this was the date for fixing the value of the house at the beginning of construction (R. p. 28).

It was the duty of the commissioners to include all elements of damages in their award and, so far as the record shows, there is no reason to believe or infer that they omitted interest from their consideration or ignored the time which had elapsed since the work began. Furthermore, the law prescribes no fixed or arbitrary time when damages to lands not taken are deemed to be sustained. The time of taking other lands does not necessarily control. *Danforth* v. *United States,* 308 U. S. 271.

Due Process Does Not Require Payment for Damage to Lands Not Taken.

The restraint imposed upon the States by the due process clause of the Fourteenth Amendment is the same as that imposed upon the United States by that clause of the Fifth Amendment.

Twining v. *New Jersey*, 211 U. S. 78, 101;

Heiner v. *Donnan*, 285 U. S. 312, 326.

It is well settled that this constitutional provision does not require the United States, in taking lands in the exercise of its power of eminent domain, to compensate the landowner for damages caused to his other lands. All that is required is that full compensation be made for the land actually taken. *Mitchell* v. *United States*, 267 U. S. 341. Decisions of the State courts are in accord in holding that the due process clause imposes no constitutional obligation on the States beyond that of providing proper compensation for the land or rights therein which are actually taken. 18 Am. Jur. 753. (Eminent Domain, Sec. 129). See also *Chicago* v. *Taylor*, 125 U. S. 161. The resulting hardships suffered by many landowners has led to the adoption of provisions in many of the State Constitutions providing compensation for consequential damages. Section 58 of the Virginia Constitution prohibits the General Assembly from enacting "any law whereby private property shall be taken *or damaged* for public uses without just compensation." It is by reason of this provision of the State Constitution that in condemnation proceedings the statute allows any landowner compensation for

damages resulting from highway construction, regardless of whether any of his land is taken or not. Thus the order of the Circuit Court in this case directed the commissioners "to award damages, if any, resulting to the adjacent or other property of the owner, *or to the property of any other person,* from the construction and operation of said highway."

Clearly the question whether an award for damages to other lands is "just compensation" within the meaning of the Virginia Constitution is a question for the State courts to decide. The Supreme Court of Appeals has held that Appellant has received just compensation for damages resulting to his other lands, and under the well settled rule this Court will accept such decision as binding and conclusive. *J. Bacon & Sons* v. *Martin,* 305 U. S. 380, and cases cited; *Thornton* v. *Duffy,* 254 U. S. 361, 368. Since due process does not require the payment of any compensation for damages to lands not taken, *a fortiori* it does not require the payment of any interest thereon. The Appellant's claim with respect to such interest does not raise a Federal question. *Neblett* v. *Carpenter,* 305 U. S. 297, 302.

CONCLUSION

The appeal should be dismissed for want of a properly presented Federal question.

Respectfully submitted,

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